STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of Samaria Heard, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JAVAY M. MILLER,

Respondent-Appellant,

and

ROBERT T. HEARD,

Respondent.

UNPUBLISHED
August 21, 2007

No. 275623
Wayne Circuit Court
Family Division
LC No. 02-415013-NA

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Respondent Javay Miller appeals as of right from an order terminating her parental rights to the minor child, Samaria Heard, under MCL 712A.19b(g), (i), and (j). We affirm.

I

Respondent argues that the trial court erred by not ensuring that she received a copy of the petition and/or waived its reading, and that she was thus denied her due process right to notice and an opportunity to be heard. Under the circumstances presented here, we disagree.

"Aside from the constitutional right to notice inherent in due process, respondents in child protective proceedings have a statutory right to notice." *In re AMB*, 248 Mich App 144, 173; 640 NW2d 262 (2001), citing MCL 712A.12 and MCR 5.920 (now MCR 3.920). This Court reviews de novo questions of law, such as issues of constitutional and statutory interpretation. *In re Treasurer of Wayne Cty for Foreclosure*, 478 Mich 1, 6; 732 NW2d 458 (2007).

MCR 3.920 governs service of process and provides in pertinent part:

(B) Summons

* * *

(2) *When Required.* Except as otherwise provided in these rules, the court shall direct the service of a summons in the following circumstances:

* * *

(b) In a child protective proceeding, a summons must be served on the respondent. . . .

(3) *Content.* The summons must direct the person to whom it is addressed to appear at a time and place specified by the court and must:

(a) identify the nature of the hearing;

(b) explain the right to an attorney . . .

(c) if the summons is for a child protective proceeding, include a prominent notice that the hearings could result in termination of parental rights; and

(d) *have a copy of the petition attached.*

(5) *Time of Service.*

(a) A summons shall be personally served at least:

(i) 14 days before hearing on a petition that seeks to terminate parental rights or a permanency planning hearing . . . .

[Emphasis added.]

MCR 3.965 governs preliminary hearings and provides in pertinent part:

(B) Procedure.

(3) If the respondent is present, the court must assure that the respondent has a copy of the petition. The court must read the allegations in the petition in open court, unless waived.

Respondent's appellate brief concedes that she failed to raise the issue of notice in the trial court and therefore must demonstrate plain error that affected her substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *In re Osborne*, 237 Mich App 597, 606; 603 NW2d 824 (1999).

The record establishes that respondent was at the September 8, 2006 preliminary hearing, at which the court stated it would continue the hearing because the Department had not yet filed an official petition, but rather, had filed only a complaint. Also present at the September 8, 2006 preliminary hearing were Mary Peyton of DHS, the minor child's attorney, and the foster care

supervisor from Wolverine Human Services, Barbara Clerebout. The court took testimony from Peyton that Samaria had been removed on September 7, 2006, and was in foster care, and that it was contrary to Samaria's welfare to remain in respondent's care because respondent had had her parental rights terminated to four of her other children. The court asked petitioner's counsel whether she anticipated that this would be a PP petition, and she responded "This will be a –This is a mandatory Permanent Custody Petition."

At the continued preliminary hearing on September 14, 2006, respondent was also present, and amendments to the petition were made and discussed on the record, including to paragraph 14 of the petition, which was amended to read "The biological father. . . deserted the newborn. . .," instead of "The mother and Heard [biological father's surname] have deserted the newborn . . ."

Respondent's appellate brief acknowledges that at the pretrial hearing on September 21, 2006, respondent's trial counsel stated on the record that respondent had been served with a copy of the petition to terminate her parental rights to Samaria. However, respondent argues on appeal that the fact that she was served and received a copy of the petition *at the **pretrial** hearing* "does not correct the procedural flaw mandated by MCR 3.965(B)(3) *at the **preliminary** hearing*." Respondent asserts that "[i]nquiry should have been made as to whether or not mother had a copy of any original or amended petition and whether or not she waived its formal reading in open court." Respondent acknowledges that "the court rules do not provide for any sanctions for failure to comply with them," but notes that she can still claim plain error that affected her substantial rights.

Neither party cites authority directly on point. The three cases respondent cites do not support that respondent's due process rights were violated, nor do they support setting aside the termination order. Respondent cites *In re Nunn,* 168 Mich App 203; 423 NW2d 619 (1988), which held that "error mandating reversal occurs where a probate court fails to conduct a dispositional hearing prior to the termination of a respondent's parental rights." In *Nunn,* unlike the instant case, a proper petition was never filed, rather, the petitions cited MCL 712A.2(b)(1) and (2) "and thus merely requested that the juvenile court take jurisdiction of respondent's children. No request to terminate respondent's parental rights was made, and no supporting statutory provision therefor was referenced." *Id.* at 209. The *Nunn* Court noted:

> Petitioner's failure to place in the record its intent to terminate respondent's parental rights until final argument violated the applicable court rules and jeopardized respondent's right to due process. This conclusion is further buttressed by the fact that the petitions failed to adequately notify respondent of the crucial and damaging allegation presented at trial regarding the children's long-term emotional neglect. [*Id.*]

The *Nunn* Court vacated the order terminating the respondent's parental rights and remanded "to afford petitioner the opportunity to file and appropriate petition and the court the opportunity to conduct a dispositional hearing." *Id.* at 210.

In the second case respondent cites, *In re Kirkwood,* 187 Mich App 542; 468 NW2d 280 (1991), the respondent argued that the termination order should be set aside because the agency failed to comply with the time guidelines for filing termination petitions set forth in MCL

712A.19a(5) and MCR 5.974(F)(1) (now MCR 3.977), i.e., no later than 42 days after a dispositional review hearing or permanency planning hearing. The *Kirkwood* Court noted:

> The issue before us is whether the termination order must be set aside because the forty-two-day requirement was not met. While the statute and court rule both require that the time limits be met, neither provides any sanction for such a violation, and we decline to add any sanction which the Legislature and the Supreme Court declined to provide. Such a procedural defect, standing alone, will not cause us to dismiss the case or set aside the termination order.
>
> However, respondent claims that the procedural defect resulted in a violation of her due process rights. Due process requires that there be jurisdiction over the respondent and subject matter of the litigation and that the respondent be afforded notice of the nature of the proceedings and an opportunity to be heard. We conclude that the failure to meet the forty-two-day requirement in this case did not divest the court of jurisdiction to continue to hear the matter. Further, respondent was provided a full hearing and an opportunity to be heard before the termination of her parental rights. Respondent's due process rights were not violated in this case. [*In re Kirkwood, supra* at 545-546. Citations omitted.]

In the final case respondent cites, *In re Jackson,* 199 Mich App 22; 501 NW2d 182 (1993), the respondent argued that the trial court's grant of two continuances of the termination hearing because the petitioner's experts were unavailable violated the 42-day requirement of MCR 5.974(F)(1)(b). As did this Court in *Kirkwood, supra*, the *Jackson* Court noted that failure to follow the time requirements of MCR 5.974(F) (now MCR 3.977) will not lead to dismissal of a termination order, as neither the court rule nor MCL 712A.19a(5) provided sanctions for their violations, and that, in any event, the respondent had not shown prejudice, as the delays afforded her an opportunity to improve her compliance with the court's order. *Id.* at 28-29.

The instant case presents facts unlike the three cases respondent cites and are discussed above. In this case, at the initial preliminary hearing date, September 8, 2006 a petition was not available. At the continued preliminary hearing on September 14, 2006, respondent was present and heard the discussions of amendments to the petition. Although respondent is correct that there is nothing in the record to suggest that she received a copy of the amended petition at the continued preliminary hearing, or that the court read all of the allegations at the continued hearing, there is no dispute that respondent was aware from the first preliminary hearing that a permanent petition was being filed, and at the continued preliminary hearing heard discussion of the amended petition's allegations. Further, one week after the continued preliminary hearing, at the September 21, 2006 pretrial hearing, respondent's counsel acknowledged that respondent had been served with the petition. In the final analysis, notice was afforded respondent in compliance MCR 3.920, i.e., at least 14 days before the hearing to terminate parental rights.

We note that under MCR 3.973, which governs dispositional hearings, "the respondent has the right to be present or may appear through an attorney," MCR 3.973(D)(2), and the trial court "may proceed in the absence of parties provided that proper notice has been given," MCR 3.973(D)(3). Here, respondent's counsel appeared at trial, and respondent does not dispute that she received proper notice.

We conclude that respondent has not shown a violation of her right to due process, nor has she shown that her substantial rights were affected by the trial court's failure at the continued preliminary hearing to read the amended petition in its entirety or to ask respondent whether she waived its reading, under the circumstances that respondent received a copy of the petition in accordance with MCR 3.920, and was present at the continued preliminary hearing when the amendments to the petition were discussed on the record (the second of two amendments made regarded the other father of several of respondents' children to whom her rights had already been terminated). Further, at the continued preliminary hearing, there was discussion and questioning such that respondent, who was present, would have been well aware of the bases for authorizing the petition—specifically, that her parental rights to four of her other children had been terminated, and that respondent voluntarily turned Samaria over to DHS, indicating that she could not care for her. In addition, at the continued preliminary hearing, counsel for respondent stipulated that "the previous terminations would serve as the basis [for the petition] without any additional allegations."

Respondent's challenge thus fails.

II

Respondent also asserts that the trial court erred by not conducting an investigation into the child's status under the Indian Child Welfare Act. We disagree.

Termination of parental rights proceedings regarding qualified Indian children are subject to the different procedures and higher standards of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.* and MCR 3.980. MCR 3.965(B)(9); MCR 3.977(A)(1); *In re Elliott*, 218 Mich App 196, 201; 554 NW2d 32 (1996). This Court reviews de novo the legal question whether the court satisfied the requirements of the ICWA. *In re IEM*, 233 Mich App 438, 443; 592 NW2d 751 (1999).

> Pursuant to the ICWA, child custody proceedings involving foster care placement or termination of parental rights to an Indian child are subject to specific federal procedures and standards. "[T]o promote the stability and security of Indian tribes and families," Congress established within the ICWA "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. . . " 25 USC 1902. * * *
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> * * * * For ICWA purposes, an "Indian child" is any unmarried individual less than eighteen years of age who is either (1) an Indian tribe member or (2) both eligible for Indian tribe membership and an Indian tribe member's biological child. 25 USC 1903(4). [*In re IEM, supra* at 443-444.]

"The fact that [a child] may have Indian heritage does not qualify him as an Indian child under § 1903(4) [of the ICWA]." *In re Johanson*, 156 Mich App 608, 613; 402 NW2d 13 (1986).

MCR 3.965(B)(9) provides that at the preliminary hearing:

The court must inquire if the child or either parent is a member of any American

> Indian tribe or band. If the child is a member, or if a parent is a tribal member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, notify the tribe or band, and follow the procedures set forth in MCR 3.980.

MCR 3.977 applies to all proceedings in which termination of parental rights is sought and specifies that "Proceedings for termination of parental rights involving an Indian child as defined by 25 USC 1901 *et seq.*, are governed by MCR 3.980 in addition to this rule."

In the instant case, the court inquired at the initial preliminary hearing on September 8, 2006:

> THE COURT: * * * Do you have any American Indian heritage in your family?
>
> RESPONDENT MOTHER: Yeah, my mother, she has Cherokee in her. I don't know—
>
> THE COURT: Is this child a member of an American Indian tribe or band?
>
> RESPONDENT: No. My daughter? No.

At the continued preliminary hearing on September 14, 2006, at which respondent was also present, the protective services investigator was examined by the court and answered "No" when asked "And is this child, or a parent, *eligible for* an American Indian Tribe?" Neither respondent's counsel nor respondent objected or stated to the contrary at that hearing.

We conclude that the trial court complied with MCR 3.965 at the initial preliminary hearing by asking respondent whether she had any Indian heritage and whether Samaria was a member of a tribe or band. Respondent's principal argument on appeal is that the trial court failed to ask her whether Samaria was *eligible for* membership. However, at the continued preliminary hearing neither respondent or her counsel objected when the protective services investigator was asked whether respondent or Samaria *were eligible for* an American Indian Tribe, and answered in the negative. We conclude that given respondent's responses at the initial preliminary hearing, and her failure to interject or object to the protective services worker's testimony at the continued preliminary hearing, the court was not obligated to make further inquiry or to apply MCR 3.980.

III

Respondent also contends that the trial court failed to find the requisite statutory grounds to terminate her parental rights. We disagree.

This Court reviews the trial court's findings that a ground for termination has been established and regarding the child's best interest for clear error. MCR 3.977(J); *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). Erroneous termination of parental rights under one statutory basis for termination can be harmless error if the court also properly found another ground for termination. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000). If

permanent termination of parental rights is sought, the petitioner bears the burden of showing that the allegations establish a statutory basis for termination by clear and convincing evidence. MCR 3.977(A)(3), (E), (F)(1)(b), (G)(3). *In re Trejo Minors*, 462 Mich 341, 351, 355; 612 NW2d 407 (2000). To issue an order terminating parental rights, the family court must make findings of fact, state conclusions of law, and specify the statutory basis for the order. MCL 712A.19b(1); MCR 3.977(H)(1); *Trejo, supra* at 355. Once a statutory ground for termination of parental rights is established, the court must terminate parental rights unless it finds that termination of the child's parental rights is clearly not in the child's best interest, and additional efforts at reunification of the child with the parent may not be made. MCL 712A.19b(5); *Trejo, supra* at 352-354.

At the December 5, 2006 trial, DHS welfare service specialist Mary Peyton testified that she authored the amended permanent custody petition filed in September 2006 pertaining to Samaria. Peyton testified that at the time Samaria was born, respondent had an open case in Detroit regarding four of her other children. Peyton testified that Wolverine Human Services handled removing Samaria from respondent.

Melissa Noel, a Wolverine Human Services foster care worker assigned to Samaria's case, testified that the four other children of respondent's have been in foster care since December 20, 2002, and respondent's parental rights to them were terminated on August 25, 2006. Noel testified that she had met with respondent many times, and that in order to avoid having her rights to Samaria terminated, respondent was supposed to go for drug screening, go for a substance abuse assessment, therapy, secure employment and find housing. Noel testified respondent "didn't do anything" but acknowledged that respondent had visited Samaria nine of eleven times. Noel testified that respondent testified positive for marijuana on September 21, 2006 and since that date had not submitted further drug screens. She testified that respondent had refused counseling, did not go for a substance abuse assessment, was not currently employed (although she had worked for one day at a Laundromat), and was living with her sister and her sister's children. According to Noel, respondent "seems no better off now than she was four years ago when her other kids were [placed into care]." Noel testified that she explained to respondent that a permanent custody petition was pending and that respondent had to take these steps, but that respondent reacted defensively and does not want any help. Noel recommended that respondent's parental rights to Samaria be terminated and testified that she believed it was in Samaria's best interests that respondent's parental rights be terminated.

Barbara Clerebout, foster care supervisor at Wolverine Human Services, testified that she supervised Samaria's case since October 2005, and that attempts had been made to place Samaria with Samaria's paternal grandmother, Toni Hicks, but an investigation revealed that Hicks' son was incarcerated and had a juvenile conviction as a sex offender.

We conclude that clear and convincing evidence was presented that without regard to intent, respondent failed to provide proper care or custody for Samaria and there is no reasonable expectation that respondent will be able to provide proper care and custody within a reasonable time considering the child's age. MCL 712A.19b(3)(g). Foster care worker Noel testified at trial that she had met with respondent many times, and that in order to avoid having her parental rights to Samaria terminated, respondent was supposed to go for drug screenings, go for a substance abuse assessment, attend therapy, secure employment and find housing. Noel testified that respondent testified positive for marijuana on September 21, 2006, and since that date had

not submitted any screens. She testified that respondent had refused counseling, and did not go for a substance abuse assessment. Respondent did not secure adequate housing; rather she was living with her sister and her sister's children and told Noel that she had located housing for herself and Samaria but would move there only once she got Samaria back. Nor did the evidence support that respondent had made progress in the area of employment, rather, the evidence was that respondent had worked for one day only. Although respondent did visit Samaria nine out of eleven times, according to Noel, respondent "seems no better off now than she was four years ago when her other kids were [placed into care]." As noted above, respondent voluntarily placed Samaria into care when she was an infant.

Once a statutory ground for termination of parental rights is established, the court must terminate parental rights unless it finds that termination of the child's parental rights is clearly not in the child's best interest, and additional efforts at reunification of the child with the parent may not be made. MCL 712A.19b(5); *Trejo, supra* at 352-354. Given the record evidence summarized above, we conclude that the trial court's finding that termination of respondent's parental rights was in Samaria's best interests was not clearly erroneous.

Given our conclusion that clear and convincing evidence supported termination under subsection (3)(g), we need not address the remaining two subsections under which respondent's rights were terminated. MCL 712A.19b(5); *Trejo, supra* at 351.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray